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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 708

INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO) AND CARPENTERS' LOCAL 1849, &c., *Petitioners*,

v.

C. J. MONTAG & SONS, INC., HOLMAN ERECTION COMPANY, INC., CURTIS CONSTRUCTION CO., *et als.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY MEMORANDUM

FREDERICK BERNAYS WIENER,
1750 Pennsylvania Avenue, N.W.,
Washington, D. C. 20006,
Counsel for the Petitioners.

FRANCIS X. WARD,
WILLIAM A. McGOWAN,
101 Constitution Ave., N.W.,
Washington, D. C. 20001,

R. MAX ETTER,
706 Spokane & Eastern Bldg.,
Spokane, Wash. 99201,

Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The briefs filed by respondents Montag and Curtis in opposition to our petition cannot be permitted to pass unchallenged or unanswered.

First. Respondent Montag attacks the Joint Board's award, with which it consistently refused to comply, on the ground (Montag Br. 11) that it "was an attempt to divide the work between *both* unions and, therefore, exceeded its

authority to *decide* the dispute." This is simply another way of saying that Montag disliked the decision, for the reason that, elsewhere expressed (Montag Br. 11), "the [Joint] Board merely rubber stamped the agreement of the international unions to divide the work."

Now, obviously, a decision can go wholly one way, or wholly another, or else in between. After all, an arbitrator is not limited by the straitjacket of "either/or," and this one plainly—and properly—did not feel itself thus restricted. We submit that the principle that makes labor arbitration awards immune from judicial intermeddling is broad enough to support every arbitral award that espouses a middle course. For, as this Court also said in *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 598-599, reasoning in terms that fit this case like a glove:

> "The Court of Appeals' opinion refusing to enforce the reinstatement and partial back pay portions of the award was not based upon any finding that the arbitrator did not premise his award on his construction of the contract. It merely disagreed with the arbitrator's construction of it.
>
> "The collective bargaining agreement could have provided that if any of the employees were wrongfully discharged, the remedy would be reinstatement and back pay up to the date they were returned to work. Respondent's major argument seems to be that by applying correct principles of law to the interpretation of the collective bargaining agreement it can be determined that the agreement did not so provide, and that therefore the arbitrator's decision was not based upon the contract. The acceptance of this view would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract. This plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. This underlines the fundamental error which we have alluded to in *United Steelworkers of America* v. *American Manufacturing Co.*, *ante*, p. 564, decided this day. As we there emphasized, the

> question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."

Here the arbitrator—the Joint Board—construed the contract—the collective bargaining agreement containing the provisions for the Joint Board's arbitration—as permitting a decision that divided the work. Montag broke its contract providing (Ex. 3, p. 12) that "The affected Unions and Contractors shall promptly comply with each job decision of the Joint Board" when it refused to comply with the Joint Board's award on the footing that this body, its own chosen arbitrator, misconstrued the contract when so deciding. And the court below exceeded its competence when it held that Montag's non-compliance with the arbitrator's award was no breach of contract simply because the court's interpretation of that contract was different from the Joint Board's.

Second. The foregoing issue, involved in petitioners' counterclaim, concerns only Montag among the respondents (Pet. 3-4, 7-9, 10-11, 14-15). The other issue in respect of which review is being sought* concerns all the respondents—and on that other issue our adversaries part company. Montag and its associates say (Montag Op. 6) that they "agree with petitioners' statement on page 13 of the petition that the conduct proscribed by Sections 303(a)(4) and

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* Pet. 2: "Whether work stoppages arising out of a demand by a union that an employer assign to its members particular work already assigned to members of another union will support a judgment for damages under §§ 303(a)(4) and (b) of the Labor Management Relations Act, 1947, in respect of any period after the two unions were no longer competing for the particular work but had agreed that it should be reassigned to members of the first union."

8(b)(4)(D) is identical," while Curtis (Curtis Op. 3) says that "the substantive meaning" of the two sections is different, relying on *Labor Board* v. *Radio Engineers*, 364 U.S. 573, 585. For reasons already adequately canvassed (Pet. 13), that case dealt with remedies rather than substance, in consequence of which Montag's concession as to identity of substantive content is plainly justified.

Thereafter, the two respondents converge once more, putting forward *International Longshoremen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237, 245, as dispositive of our contention that Section 8(b)(D)(4) is not violated when the two unions concerned are no longer competing for the particular work but had agreed on its assignment (Montag Op. 5; Curtis Op. 3-4). Significantly, neither respondent has seen fit to quote more than the same single sentence from the *Juneau* opinion.

What this Court actually said in *Juneau* shows that the present situation was not under consideration there. It said (342 U.S. at 244-245):

> "Here the jurisdictional row was between the outside union and the inside union. The fact that the union of mill employees temporarily acceded to the claim of the outside group did not withdraw the dispute from the category of jurisdictional disputes condemned by § 303(a)(4)."

Here, however, on petitioners' view of the present record, there was not a mere temporary accession by the Iron Workers, but a complete yielding by them to the Carpenters, so that there was no further "jurisdictional row."

Similarly, the court of appeals cases cited at Curtis Op. 3—*Vincent* v. *Steamfitters' Local*, 288 F. 2d 276, 278 (C.A. 2); *Local 978, United Brotherhood of Carpenters* v. *Markwell*, 305 F. 2d 38, 47 (C.A. 8)—did not deal with a situation where there is no conflict between two unions, while the Labor Board decisions predominate in petitioners' favor. Five Labor Board rulings, duly cited at Pet. 12,

hold that there is no jurisdictional dispute within the meaning of §§ 8(b)(4)(D) and 10(k) in the absence of conflicting claims between competing unions. Two more, relied on by Montag (Op. 9), seem to hold that agreement by the two unions is unavailing unless the employer joins therein. *Bricklayers & Masons Int'l Union, Local 3*, 144 NLRB 1279; *International Mailers Union*, 146 NLRB No. 23, 55 LRRM 1272, 1274. The third Labor Board case relied on by Montag, *Local 69, United Association &c. of the Plumbing and Pipefitting Industry*, 149 NLRB No. 64, decided November 13, 1964, does not bear on the present point either way.

Significantly, the court below did not accept Montag's contention that the statutory provision must be construed literally (Pet. App. A4-A5; Montag Op. 5). The question is a recurring one, no judicial decision other than the one sought to be reviewed has come to grips with it, and the numerical weight of authority of Labor Board rulings is counter to what was decided below.

Third. This is not a situation where petitioners are urging this Court to overturn a factual determination made at the trial on conflicting evidence, far less one where there are concurrent findings by two courts. Here the findings by the trier of facts (MR 53-61, 68-72; HR 22-28; CR 24-29) shed no light whatever on the issue contested at the trial that was and remains critical: When and to what extent did the Carpenters and the Iron Workers resolve their differences concerning the assignment of the initially contested "rigging" work?

We are not asking that this Court resolve the evidentiary conflicts in the present record (though we must note that Curtis Op. 5, quoting from *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 454, has drawn entirely on the dissenting opinion in that case).

All we urge is that the Court rule whether, after there is no longer any competition between rival unions for par-

ticular work, after both are in agreement regarding its assignment, the employer can none the less obtain a judgment for damages under § 303(a)(4). If that issue—a pure question of law—is decided in accord with our view, and in accord with the numerical weight of the Labor Board authorities, these consolidated causes may then appropriately be remanded to the district court for detailed findings of fact regarding the time, the scope, and indeed the very nature of the agreement reached by the Carpenters and the Iron Workers here.

CONCLUSION

For the foregoing additional reasons, it is respectfully submitted that this petition for certiorari should be granted.

FREDERICK BERNAYS WIENER,
1750 Pennsylvania Avenue, N.W.,
Washington, D. C. 20006,
Counsel for the Petitioners.

FRANCIS X. WARD,
WILLIAM A. MCGOWAN,
101 Constitution Ave., N.W.,
Washington, D. C. 20001,

R. MAX ETTER,
706 Spokane & Eastern Bldg.,
Spokane, Wash. 99201,

Of Counsel

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